FILE COPY

FILED
DEC 13 1946
CHARLES ELMORE CROPLEY

No. 141

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE CONFEDERATED BANDS OF UTE INDIANS,
PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes, Treaties, and Executive Orders Involved	4
Statement	4
Summary of argument	19
Argument:	
I. Petitioners did not acquire any compensable interest in these lands by virtue of the Executive Order of 1875	19
A. The President was without power to convey a compensable interest to petitioners	19
B. Even if the President had the power to convey public lands, the Executive Order of 1875 did not constitute an exercise of such power	24
II. The Act of 1880 did not commit the United States to compensate petitioners for the executive-order lands	34
The terms of the 1880 Act, its legislative history and its administrative construction show no Congressional intent to compensate petitioners for the lands described in the Executive Order of 1875	34
The history of the 1880 Act	36
The administrative construction	41
Petitioners' contentions, based upon the asserted understanding of the parties, are without merit	43
III. Petitioners' claim is barred by *res judicata*	47
Conclusion	51
Appendix	52

CITATIONS

Cases:	
Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316	49, 50
Bates v. *Bodie*, 245 U. S. 520	50
Choctaw Nation v. *United States*, 318 U. S. 423	46
Confederated Bands of Ute Indians v. *United States*, 100 C. Cls. 413	26
Confederated Bands of Ute Indians v. *United States*, C. Cls. No. 46640	15, 26
Creek Nation v. *United States*, 318 U. S. 629	46
District of Columbia v. *Johnson*, 165 U. S. 330	47
Duwamish, et al. Indians v. *United States*, 79 C. Cls. 530	49
Klamath Indians v. *United States*, 296 U. S. 244	49

Cases—Continued

	Page
Shoshone Indians v. *United States*, 324 U. S. 335	45, 47
Sioux Tribe v. *United States*, 316 U. S. 317	16, 19, 22, 23, 24, 30, 42
United States v. *Alcea Band of Tillamooks*, Oct. Term, 1946, No. 26, decided November 25, 1946	21
United States v. *California & Ore. Land Co.*, 192 U. S. 355	49
United States v. *Causby*, October Term 1945, No. 630	43
United States v. *Choctaw and Chickasaw Nations*, 179 U. S. 494	46
United States v. *Mille Lac Chippewas*, 229 U. S. 498	46
Ute Indians v. *United States*, 45 C. Cls. 440; 46 C. Cls. 225	15, 18, 26, 36, 45, 48

Statutes:

Treaty of October 7, 1863, Art. 2, 13 Stat. 673, 2 Kappler 856	5, 7, 35
Treaty of March 2, 1868, Art. II, III, VII, 15 Stat. 619, 2 Kappler 765, 990	4, 35
Act of April 29, 1874, Art. I, 18 Stat. 36, 1 Kappler 151	36, 40
Act of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180	13, 17, 34, 41
Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205	13, 41, 45
Act of March 3, 1909, c. 263, 35 Stat. 781	14, 48, 50
Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. 288 (b)	2
Act of June 28, 1938, c. 776, 52 Stat. 1209, as amended by the Act of July 15, 1941, 55 Stat. 593	15, 49, 51

Miscellaneous:

Executive Order of November 22, 1875	12, 24
Executive Order of August 4, 1882	13, 41, 42
10 Cong. Rec. pt. 1, pp. 17, 30, 44, 77, 113	37
10 Cong. Rec. pt. 2, p. 1538	37
10 Cong. Rec. pt. 3, pp. 2027–2030, 2058–2067, 2121–2130, 2152–2164, 2189–2202, 2221–2228, 2249–2252, 2253–2268, 2309–2320	39
10 Cong. Rec. pt. 5, pp. 4251–4263, 4464–4465, 4487	39
43 Cong. Rec. pt. 3, pp. 2769–2770, 2775–2776	50
43 Cong. Rec. pt. 4, pp. 3064–3065, 3320–3323	50
H. Rep. No. 1401, 46th Cong., 2d sess.	39
H. Rep. No. 1028, 75th Cong., 1st sess.	51
S. Rep. No. 186, 47th Cong., 1st sess.	45
S. Rep. No. 1036, 60th Cong., 2d sess.	50
S. Rep. No. 1219, 75th Cong., 1st sess.	51
Ex. Doc. No. 1, pt. 5, 47th Cong., 2d sess.	37
Sen. Ex. Doc. No. 29, 46th Cong., 2d sess.	8, 31, 32
Sen. Ex. Doc. No. 108, 47th Cong., 1st sess.	45
Report of the Commissioner of Indian Affairs (1872)	21
Our Indian Wards, Manypenny (1880)	36

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (R. 24–38) are reported at 64 F. Supp. 569.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on March 4, 1946 (R. 38). The petition for a writ of certiorari was filed on June 3, 1946, and was granted October 14, 1946. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February

13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. 288 (b).

QUESTIONS PRESENTED

In 1868 the United States entered into a treaty with the Ute Indians whereby the Government established a reservation of about 15 million acres for the Indians, and the latter expressly relinquished all claims to lands not embraced within the reservation. The treaty described the boundaries of the reservation in precise terms. Within the reservation so described lay the White River Valley occupied by the Indians. Subsequently, as a result of a surveyor's error, an erroneous north boundary was established about 16 miles south of the true north boundary of the reservation as described by the treaty, thus ostensibly excluding the White River Valley from the reservation. Under the mistaken impression that the erroneous north boundary correctly marked the north line of the reservation as described in the treaty, President Grant issued an Executive Order on November 22, 1875, setting aside for the use of the Ute Indians a strip of public land bordering not on the erroneous north line but on the true north line of the 1868 treaty reservation.

Under the Act of June 15, 1880, the Utes ceded their reservation to the United States. The Government by section 3 of the Act agreed that "all the lands * * * the title to which is, * * * released and conveyed to the United States" were

to be held as public lands subject to cash entry with the net proceeds to be deposited to the credit of the Indians. Two years later by Act of July 28, 1882, Congress declared that the portion of the "Ute Indian Reservation lately occupied by the Uncompahgre and White River Utes" was public land subject to disposition in accordance with section 3 of the 1880 Act. By Executive Order of August 4, 1882, the President restored to the public domain the land originally withdrawn by the Executive Order of 1875.

The ultimate question is whether the petitioner Indians had an interest in the executive-order lands for which the United States must pay compensation. Subsidiary questions are:

1. Was the President empowered by Congress, either expressly or impliedly, to convey any interest in those lands?

2. If so, did the Executive Order of November 22, 1875 constitute an exercise of such power?

3. If the petitioners did not acquire a compensable interest by the Executive Order of 1875, did Congress, by the Act of June 15, 1880, nevertheless agree to compensate petitioners for the executive-order lands?

4. Are petitioners' claims rendered *res judicata* by the judgment entered in their favor in 1910 in a suit against the United States founded on their claims under the 1880 Act?

STATUTES, TREATIES, AND EXECUTIVE ORDERS INVOLVED

The Jurisdictional Act of June 28, 1938, 52 Stat. 1209, as amended by the Act of July 15, 1941, 55 Stat. 593, appear at R. 5–10; Articles II and III of the Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990; the Executive Order of November 22, 1875, 1 Kappler 834; section 3 of the Act of June 15, 1880, 21 Stat. 199, 203–204, 1 Kappler 180, 185; and the Executive Order of August 4, 1882, 1 Kappler 834–835, appear in the Appendix, pp. 52–58.

STATEMENT

This is an action to recover for the alleged taking of about 625,000 acres of land originally withdrawn from the public domain by Executive Order of November 22, 1875, and restored to the public domain by Executive Order of August 4, 1882.

By treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, the United States established for the Ute Indians a reservation containing about 15 million acres of land in Colorado. The reservation was particularly described in Article II of the treaty as an area bounded on the east by the 107th degree of west longitude; on the north by a line 15 miles north of the 40th parallel of north latitude; on the west by the western boundary of Colorado; and on the south by the southern boundary of Colorado. By Article III of the

treaty the petitioners relinquished "all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined" in the reservation established by Article II of the treaty (Fdg. 3, R. 12).

Within the exterior limits of the reservation as described in the treaty, the Government, late in 1869, established the White River Agency at latitude 40°6′ north, and longitude 107°40′ west (Fdg. 5, R. 13). About that time a deputation of Utes visited some miners working along Douglass Creek, Wyoming and in North Park, Colorado, and ordered them away on the mistaken assumption that the miners were trespassing on the 1868 treaty reservation (Fdg. 6, R. 13–14). Douglass Creek is about 35 miles east of the east boundary and about 56 miles north of the north boundary of the 1868 treaty reservation.[1] North Park is a large area in Colorado which at its nearest point is over 30 miles east and about 10 miles north of the true northeast corner of the reservation. (See map attached to this brief.) Apparently the

[1] Moreover, it is in Wyoming above the area claimed by the Utes as part of their original country. This is shown by an earlier treaty with the Tabeguache or Uncompahgre Utes, the northernmost band of the Confederated Bands of Utes. Treaty of October 7, 1863, 13 Stat. 673, 2 Kappler 856, confirmed by Article I of the 1868 treaty. The description in the preamble of that treaty delimiting the land claimed by the Indians shows the Indians did not claim north of the 41st parallel of north latitude, the line between Colorado and Wyoming.

matter was explained to the satisfaction of the Indians (Fdg. 6, R. 13–14).

In July 1874, some six years after the treaty, the Indians remonstrated against the opening of a proposed wagon road through the Bear River Valley, "which valley they claim[ed] as their country." The nearest point of Bear River is about 15 miles north of the true north line of the reservation as defined in the 1868 treaty. (See map.) The Commissioner of Indian Affairs, speaking through the Indian Agent, advised the Indians "that the Bear River Country was not theirs and they had no rights in it whatever." The agent in September 1874 reported "The Indians listened to me respectfully, and dispersed quietly, and I have heard nothing from them in regard to the matter since." From the Indian Agent's report of June 21, 1875, however, it appears the Indians were continuing to assert that Bear River Valley was part of their country (Fdg. 6, R. 14–15).

All this time the northern boundary of the reservation was unsurveyed; and the absence of a settled line probably led to desultory claims such as those with respect to Douglass Creek and North Park. In June 1875 the agent urged that a few of the leading chiefs of the Indians of the White River Agency be permitted to visit Washington to confer with regard to "the northern boundary of this Reservation. * * * I think that such

a visit and conference would be the means of correcting the misunderstanding which now appears to exist among the Indians here in regard to the conditions of the Treaty of 1868 determining the boundaries, northern and eastern of their Reservation, * * *." The agent stated, "If I have talked a minute I have talked a hundred hours on the subject [the Indians' claim to Bear River Valley] and so far as I can learn in the numerous councils which I have had with them most, if not all, the Indians here acknowledge and are living under the Treaty of 1864 and do not recognize the conditions of any other which would [limit(?)] the extent of their territory—at least I can get no concession from them to that effect."[2] (Fdg. 6, R. 15–16.)

Finally in October and November 1875, Deputy Surveyor J. W. Miller under contract with the Government ran a line from east to west across the reservation. The line was not the true north boundary of the reservation (R. 17). Miller did not commence with the northeast corner of the

[2] The "Treaty of 1864" to which the agent referred doubtless was the Treaty of October 7, 1863, 13 Stat. 673, 2 Kappler 856, ratified by the Senate on March 25, 1864. Under Article 2 of that treaty there was reserved to the Tabeguache or Uncompahgre Band (the northernmost band of the Utes) as a hunting reserve land far south of the area in controversy. It did not include Bear River Valley, North Park, Douglass Creek, or even the White River Valley, and by Article 2 the Indians did "cede, convey and relinquish" all their claims outside the hunting reserve.

reservation as described in the 1868 treaty. Instead he started at a point on the east line about 15 to 18 miles south of the northeast corner as defined in the 1868 treaty and ran a line west to the western boundary of Colorado.[3] Miller knew

[3] The reason for the erroneous starting point is as follows: In 1873 part of the east line of the reservation was surveyed by Deputy Surveyor Robert C. Darling, under contract with the United States. Darling's instructions were to survey the east line of the reservation as defined in the treaty with the terminal point "coinciding with the 222d mile from the said Initial point." App., p. 61. (For full text of Darling's instructions see Appendix, pp. 58–63.) Darling commenced on the meridian of the 107° west at the point where it intersected the southern boundary of Colorado. His field notes show he proceeded north and completed the survey at a mile corner which he designated 222. (Vol. 189, Colorado, General Land Office, pp. 1–59.) The certificate of Darling's assistants attached to the field notes recites that they assisted Darling "in surveying the Eastern Boundary of the Ute Indian Reservation of Colorado, from the 37th Paralel [sic] of N. Latitude: North to a point 15 miles North of the 40th Paralel [sic] coresponding [sic] to the 222 mile corner * * *." (For full text see Appendix, pp. 63–64.) Darling's survey was erroneous for the simple reason that his mile corner 222 was 16 miles, 6 chains short of reaching the northeast corner of the reservation as described in the 1868 treaty.

Miller's instructions were to "commence at the 222nd mile post of the East Boundary of said Reserve which is the northeast corner thereof and run due west * * *." App. p. 66 (For full text of Miller's instructions see Appendix, pp. 65–70). In view of Miller's comments at the time he ran the line and the actual location of his line as reported by the Indian agent (Fdg. 7, R. 17), Miller must have started from Darling's mile post 222, since there had been no survey of the eastern line other than Darling's; see also, Sen. Doc. No. 29, 46th Cong., 2nd Sess. (1880), pp. 41, 44). Darling had been instructed to perpetuate his "terminal or 222d mile corner" by establish-

his starting point was wrong and was "from fifteen to eighteen miles south of the position in which it was supposed to be as established by the treaty of 1868." He informed the Indian Agent "that he [Miller] repeatedly so declared it to be to his assistants and members of his party * * *." In the presence of two of the leading chiefs Mr. Miller told the Indian Agent "that he was not running the [northern] boundary line and that their line would be found to run from 15 to 18 miles north of the agency building." The agent reported that "What Mr. Miller said agreed exactly with all that I had previously been able to learn from maps and other sources in the matter, and with what I had previously told the Indians when obliged to say something in reply to their persistent questioning." The agent also reported that Mr. Miller's statement agreed with an observation made the preceding season by a topographer of the United States Geological and Geographical Survey who located the 40th parallel of north latitude as running about a mile and a half north of the agency building, and that this jibed with information the agent had received from his predeccessor who in turn had been informed that the northern boundary of the reservation was about 18 miles north of the agency (Fdg. 7, R. 16–18).

ing a prominent monument properly marked to show it was the northeast corner of the Ute reservation." (See Appendix, p. 62.)

The erroneous Miller line was about 1/8 mile south of the agency building and was south of the White River Valley, which the Utes had occupied for years (Fdg. 7, R. 17, see map attached to brief). Both the agency building and the White River Valley in fact were indisputably within the reservation as defined in the 1868 treaty and the erroneous survey in no sense affected the Indians' title to that portion of their reservation lying between Miller's erroneous line and the true north line. Nevertheless, the running of the erroneous north line, coupled with Miller's statements to the Indians that the line was 15 to 18 miles south of the true north line of the reservation, left the agent "very much embarrassed" (R. 16). In October 1875 after Miller had left, the agent wrote to the Commissioner (Fdg. 7, R. 18):

> It must be seen at once that after all the trouble which I have had in regard to this question within the last twelve months, continually putting off the Indians by informing them that Mr. Miller and authority from Washington would come this season and tell them just where their line was, that I now feel very much embarrassed.
>
> I urge the propriety, the absolute necessity at the earliest practicable date of a new survey.

In November 1875 the Commissioner of Indian affairs had been advised by the attorney for the surveyor Miller that the Miller survey as com-

pleted "develops the fact that the White River and surrounding valleys as well as the Agency buildings and improvements at the White River Agency lie north of the said boundary and consequently are not within the limits of the said Ute Reservation." The Commissioner in his letter of November 19, 1875 (Fdg. 8, R. 19) transmitted to the Secretary of the Interior the information supplied by the surveyor's attorney, and then stated:

> In view of these facts I have the honor to recommend that the President be requested to issue an order withdrawing all that tract of country lying between the north boundary of the Ute Reservation as defined in treaty of March 2, 1868 (Stat. at L., vol. 15, p. 619) and the 1st standard parallel north and setting apart the same as an addition to the present Ute Indian Reservation.

Thus notwithstanding the agent's earlier report that Miller's line was not the true boundary, the Commissioner, in making his recommendation for an Executive Order, made no reference to the agent's report but clearly led the Secretary to believe that Miller's line was the true north line of the Ute Reservation and that the Agency improvements and the White River Valley were outside the north boundary of the reservation. The Secretary passed on to the President a copy of the Commissioner's letter and joined in the

recommendation for an Executive Order (Fdg. 9, R. 19). The President on November 22, 1875, issued an Executive Order withdrawing from public sale the land in controversy and setting it aside for the use of the Utes. (Fdg. 10, R. 19–20.)

That the Government's purpose in issuing the Executive Order was simply to assure to the Utes the continued possession of the White River Valley and the Agency improvements is made clear by the fact that, in advising the agent of the issuance of the order, the Commissioner stated (Fdg. 11, R. 20):

> This action fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation, as enlarged.

The Executive Order of 1875 did not describe the land by reference to the erroneous north line fixed by Miller but described the land as "Commencing at the northeast corner of the present Ute Indian Reservation as defined in Treaty of March 2, 1868 * * * thence running north on the 107th degree of longitude to the first standard parallel north; * * *." In other words, the Executive Order described a rectangular tract of land about 9 miles wide and 109 miles long adjoining, not Miller's erroneous north line, but the true north line of the 1868 treaty reservation.

To put it another way, Miller's north line was about 16 miles, 6 chains south of the south line of the executive-order land. (See the map attached to this brief.)

By an agreement dated March 6, 1880, amended and ratified by the Act of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180, the petitioners sold their reservation to the United States, excepting only certain lands for allotment to individual members. Section 3 of the Act, after providing for allotments in severalty, directed that "* * * all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States * * *." The Act then specifies that the land be subject to cash entry and that the proceeds after certain deductions be deposited to the credit of the Indians (Fdg. 12, R. 20–21).

Merely to remove doubts entertained by settlers as to their right to make entry and obtain patents, Congress by the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205, declared the lands formerly occupied by the Uncompahgre and White River Utes to be public lands subject to disposal in accordance with section 3 of the 1880 Act, (Fdg. 13, R. 22). A few days later on August 4, 1882, the President issued an Executive

Order restoring "to the public domain" the land set aside for the use of the petitioners by the Executive Order of November 22, 1875 (Fdg. 15, R. 23). Thereafter the executive-order lands were opened to entry as public lands and the proceeds of the sales were deposited to the credit of the Government (Fdg. 16, R. 23).

Following the Act of 1880 a large amount of the acreage embraced within the former reservation as described in the 1868 treaty was sold in accordance with section 3 of the 1880 Act. The United States also reserved substantial areas for public purposes. To permit an accounting for the disposal of these lands formerly a part of the 1868 treaty reservation, Congress by the Act of March 3, 1909, c. 263, 35 Stat. 781, 788–789, conferred power on the Court of Claims to hear, determine, and render final judgment on "the claims and rights" of petitioners under the agreement ratified by the 1880 Act, "including the value of all lands ceded by the said Indians [petitioners] which have been set apart and reserved from the public lands as public reservations * * *." Pursuant to that jurisdictional act the petitioners brought suit in the Court of Claims seeking recovery for the failure of the United States to dispose of the lands ceded by the agreement of 1880, for an accounting for lands sold, and for compensation for the lands reserved by the United States for public purposes. The petitioners re-

covered a judgment for the proceeds of the cash sales of land, plus the value of lands reserved for public purposes less offsets and deductions. *The Ute Indians* v. *United States*, 45 C. Cls. 440, 46 C. Cls. 225 (1910).[4] None of the lands so compensated for lay north of the true boundary of the reservation as fixed by the 1868 treaty and accordingly did not embrace the executive-order lands. (Fdg. 17, R. 23–24).

By Act of June 28, 1938, 52 Stat. 1209, as amended by the Act of July 15, 1941, 55 Stat. 593 (R. 5–10) Congress conferred jurisdiction on the Court of Claims "to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent (sic) band thereof, may have against the United States * * *" (R. 5). By section 6 of that Act the Court of Claims was authorized to give judgment in favor of petitioners if the court found that any lands formerly belonging to petitioners had been taken by the United States without compensation therefor. Pursuant to this Act petitioners instituted the present action in the court below to recover for an alleged taking by the United States of the land embraced in the Executive Order of 1875 and

[4] On October 15, 1945, a supplemental action was instituted in the court below by the petitioners seeking an accounting from July 1, 1910, the termination date of the prior accounting, down to June 28, 1938. *The Confederated Bands of Ute Indians* v. *The United States Of America*, No. 46640.

restored to the public domain by the Executive Order of 1882. The court below found the facts, concluded that petitioners were not entitled to recover, and entered judgment dismissing their petition (R. 11–24, 38). On June 3, 1946, petitioners filed their petition in this Court for a writ of certiorari to review the judgment. Certiorari was granted on October 14, 1946 (R. 38).

SUMMARY OF ARGUMENT

I

A. This Court's decision in *Sioux Tribe* v. *United States*, 316 U. S. 317, is conclusive that the President had no power to convey to petitioners a compensable interest in the land described in the Executive Order of 1875. The Treaty of 1868 did not delegate to the President any power to enlarge the reservation. Petitioners offer no controlling distinction of the *Sioux* decision nor do their arguments establish that Congress authorized the President to convey the executive-order land to petitioners.

B. Petitioners' contention that the Executive Order of 1875 was intended to vest in them a compensable interest to these lands is immaterial because such intention, even if it existed, could not remedy the lack of Congressional authorization. Moreover, the findings and the evidence show that both before and after the issuance of the Executive Order there was no such under-

standing on the part either of the Government officials or of the Indians. The record reveals a uniform understanding by the Government officials that the 1868 treaty specifically delineated the area reserved to petitioners; that the Indians knew it; and that the issuance of the Executive Order of 1875 was intended only to cover the White River Valley lands, which already lay within the bounds of the 1868 treaty reservation, and to meet a situation resulting from an erroneous survey of the north treaty-boundary, which survey as drawn, would have deprived the Indians of a portion of the treaty reservation.

II

Congress, by enactment of the Act of June 15, 1880, 21 Stat. 199, did not ratify the Executive Order of 1875, nor did it thereby agree to compensate the petitioners for the executive-order lands. The Act by its express terms limited the Government's promise to compensate petitioners for lands "title to which is, by the said agreement * * * released and conveyed to the United States." Since petitioners had no title to the executive-order lands, those lands are excluded by the plain terms of the Act. The legislative history of the 1880 Act shows that the executive-order lands were never mentioned or considered by Congress in enacting the legislation. No basis exists for an implication that Congress could have

intended to compensate petitioners therefor. Far from intending to bestow a gratuity upon petitioners, Congress, as appears both from the other provisions of the Act and from its legislative history, was actuated by hostility towards petitioners resulting from the White River Massacre in 1879, for which Congress held one of petitioner bands responsible. The view of the officers charged with the administration of the Acts of 1880 and 1882 was that the lands described in the Executive Order of 1875 were not embraced in the 1880 Act.

Petitioners' principal contention in this Court is that they understood they were to be compensated for the executive-order lands. However, such a contention is without factual foundation; the record contains neither evidence nor findings to support it. Moreover, such an understanding—even if it existed—could not alone justify imposition of liability since there is no showing that Congress knew of such understanding and intended to give effect to it.

III

In 1910 petitioners recovered all sums due them up to that time founded upon the 1880 agreement. *Ute Indians* v. *United States*, 45 C. Cls. 440; 46 C. Cls. 225. The judgment in that case is conclusive of all claims of petitioners under the 1880 Act, and is *res judicata* of the present claim.

ARGUMENT

I

PETITIONERS DID NOT ACQUIRE ANY COMPENSABLE INTEREST IN THESE LANDS BY VIRTUE OF THE EXECUTIVE ORDER OF 1875

A. *The President was without power to convey a compensable interest to petitioners.*—To recover, petitioners must establish that they were the owners of such an interest in the 1875 executive-order lands as to require the payment of just compensation to them when the lands were restored to the public domain by the subsequent Executive Order of 1882. In *Sioux Tribe* v. *United States*, 316 U. S. 317, this Court unanimously held that, without express or implied authority from Congress, the President could not by executive Order convey to an Indian tribe an interest in public lands for which the United States was obliged to compensate the tribe when the lands were restored by a subsequent executive order.[2]

[2] The executive orders in the *Sioux* case withdrew public lands from sale and settlement and set them apart for the use of the Sioux Indians as additions to their permanent treaty reservation. The orders provided (p. 321) that the described territory "be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation." The Executive Order here used precisely the same language (R. 19-20). Note the difference in language in the final lines of an Executive Order of withdrawal issued for the

Petitioners seek to avoid the effect of the *Sioux* decision by the contention that the Executive Order of 1875 was intended to settle a dispute as to the location of the north line of the reservation fixed by the 1868 treaty (Br. 28).[5] But Article II of the treaty precisely defined the exterior bounds of the reservation, and it explicitly described the north boundary as running due west from a point on the 107th meridian of longitude 15 miles north of the 40th parallel of north latitude to the Colorado border. In Article III of the treaty the Indians expressly relinquished all claim to any land other than was "embraced in the limits defined in the preceding article." (Appendix, p. 55.) This language clearly shows the intention of the Indians and of the Government, contemporaneous with the treaty, that the reservation was limited to the lands south of the north line described in the treaty as it should be later established by survey. Of course, the strip later added by the 1875 Executive Order was north of the north line defined in the treaty. But no authorization to the President to convey additional land is contained in the treaty. Thus, as in the *Sioux* case, Congress did not delegate to the President authority to convey to the Indians a

purpose of settling a boundary dispute with these petitioners (R. 37–38; Rept. Comm'r. Ind. Affairs 1877, p. 240).

[5] We shall show later that this contention is based on assertion, not fact (*infra*, pp. 24–34).

compensable interest in any portion of the public domain.[7]

Petitioners strain to distinguish the *Sioux* case. Their attempted distinctions, however, do not establish any congressional authorization empowering the President to convey public lands. Petitioners assert that the purpose of the Executive Order in the *Sioux* case (suppression of liquor traffic) was different from the purpose of the Executive Order in this case (to protect Indians in the occupation of the White River Valley) (Br. 27–29). But manifestly, whether the President was empowered to vest the Indians with the ownership of public land does not depend on the purpose the executive order was intended to accomplish. In both instances the orders were for the benefit of the Indians. In fact, all executive-order reservations were established for the benefit of the Indians. For example, the 1872 Annual Report of the Commissioner of Indian Affairs referred to some 40,000 Indians who had no reservation secured by treaty, but were by Executive Order placed on some 15 reservations set apart from the public domain. The Annual Report stated (p. 84) "The Indians thus located, however, have, in the nature of the case, no assur-

[7] This case is not concerned with any question of "original Indian title." There is not present here the issue involved in the case *United States* v. *Alcea Band of Tillamooks*, —— U. S. ——, October Term, 1946, No. 26 decided November 25, 1946.

ance for their occupation of these lands beyond the pleasure of the Executive." Moreover, petitioners' assertion (Br. 28) that the Executive Orders in the *Sioux* case were merely for suppression of the liquor traffic and in no other sense for the benefit of the Indians is not factually correct. While the liquor problem was a major factor leading to the issuance of the Executive Orders, it was not the sole objective. As to the Standing Rock addition, "a further reason for said request" [by the Commissioner for the Executive Order] was that "the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by [the Fort Laramie] treaty * * * but are included in the tract proposed to be withdrawn", 316 U. S. at p. 320.

Petitioners apparently have abandoned the contention made in their petition for certiorari (Pet. 15) that prior to the *Sioux* decision it had been generally understood that the titles of Indian tribes under executive-order reservations established for their benefit were unassailable. Instead they now simply argue that in 1875–1880 there was no decision such as that in the *Sioux* case (Br. 26) and that (Br. 16–17, fn. 4) the Indians at that time "had no power to divine that some 62 years later a court would draw some esoteric distinction between the quality of ownership in that part of their land described in the treaty and that part described in the Executive Order.

(See *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317.)".

It is true there was no decision holding that the Indians acquired no interest in executive-order lands compensable as against the United States. But, as this Court took care to point out in the *Sioux* case, both Congress and the Executive understood during the period from 1872–1880 when the great number of executive-order reservations were established, that the Executive Orders did not vest the Indians with title as against the United States. *Sioux Tribe* v. *United States*, 316 U. S. 317, 327–328; see Government's Brief therein pp. 23–25 for a detailed statement of the materials showing such understanding.*

Nor is there any substance in petitioners' argument (Br. 28) that here the Government honored the stated purpose of the 1875 Executive Order by excluding settlers, while in the *Sioux* case settlers were not disturbed. The purpose of the Sioux Executive Orders, suppression of liquor traffic, did not require the exclusion of bona fide settlers on the land prior to the issuance of Executive Orders. On the other hand, the purpose motivating the issuance of the Executive Order of 1875 was to bar settlers from the White River Valley. The difference in purposes cannot create in the Presi-

* It is noteworthy that the Executive Orders in the *Sioux* case were issued at practically the same time (1875 and 1876) as was the order in this case (1875).

dent a power to convey a compensable interest in the public domain. Under the Constitution that power resides in Congress alone. *Sioux Tribe* v. *United States*, 316 U. S. 317, 324.

B. *Even if the President had the power to convey public lands, the Executive Order of 1875 did not constitute an exercise of such a power.*—Petitioners assert that at the time of the agreement of 1880 the Indians understood they owned the executive-order lands (Br. 15). However, that assertion is utterly without support in the record. Moreover, whatever the Indians' understanding as to ownership may have been, it does not supply Congressional authority empowering the President to convey public lands.

The record clearly shows that the Indians never were given to understand that they owned the executive-order lands or that the administrative officers of the Government intended the Executive Order to vest title in the petitioners. In 1869 some Indians mistakenly thought miners working on Douglass Creek, Wyoming, and in North Park, Colorado, were on the reservation, although in fact those places were far north and east of the reservation limits (*supra*, pp. 5–6; see map attached to brief). The Commissioner reported that "the matter being explained to the Indians, no further trouble is apprehended". Of the same incident, the Superintendent of Indian Affairs reported that "In this assertion the Indians were mistaken," and that the lands "are not within fifty

miles of the reservation" (R. 13–14). Similarly, in 1874 some Indians asserted a claim to the Bear River Valley, but were informed explicitly by the Commissioner "that the Bear River country was not theirs, and that they had no rights in it whatever" (R. 15). This unfounded claim to Bear River Valley was reported by the Indian Agent to result, not from the Indians' understanding of the 1868 treaty, but from the fact that the Indians "are living under the Treaty of 1864 and do not recognize the conditions of any other which would [limit(?)] the extent of their territory" (R. 15–16). (See fn. *supra*, p. 7.)

Despite the Commissioner's express rejection of the Indians' claim to the Bear River country, the principal Indians of the White River Agency, apparently under the impression that their rights were fixed, not by the 1868 treaty but by the 1864 treaty, requested through the agent that a delegation be permitted to visit Washington. The agent favored the request on the ground that a conference in Washington "would be the means of correcting the misunderstanding which now appears to exist among the Indians", and "would induce them to be more quiet and contented in the face of the present and proposed immigration of white settlers to the Bear River Valley" (R. 15). Thus, it is clear that the Indians were simply mistaken in their claim to Bear River Valley and that this mistake resulted, not from any dispute over the meaning of the 1868 treaty, but because so far as

the Indians were concerned they were "living under the Treaty of 1864". (See fn. 2, *supra*, p. 7).

All these places, Douglass Creek, North Park and Bear River Valley, lie wholly outside both the 1868 treaty reservation and the executive-order lands in controversy. It is clear that the officers of the Government, far from encouraging the Indians in their unfounded claims, consistently and explicitly advised the Indians that those places were outside of their reservation.

An entirely different situation prevailed with respect to White River Valley. That valley lay wholly within the 1868 treaty reservation. No part of it falls within the executive-order lands (See map attached to brief). It belonged to the Indians and the Indians' ownership of that valley was confirmed to them by the 1868 treaty. Furthermore, since the Act of 1880, compensation to petitioners has been allowed, or provision for compensation has been made, with respect to every acre in the 1868 treaty reservation, including the White River Valley.*

* *The Ute Indians* v. *United States*, 45 C. Cls. 440; 46 C. Cls. 225 (accounting for lands disposed of up to July 1, 1910); *The Confederated Bands of Ute Indians* v. *United States*, No. 46640 pending in Court of Claims (accounting from July 1, 1910, to June 28, 1938); *Confederated Bands of Ute Indians* v. *United States*, 100 C. Cls. 413 (1943) (interlocutory judgment holding the United States liable for the value as of June 28, 1938, of all lands in the 1868 treaty reservation, not covered by the two accounting cases cited above).

Significantly, no difficulty arose with respect to the White River Valley lands until after the erroneous Miller survey in October and November 1875. (See Statement, *supra*, pp. 7–12). When Miller reached the proximity of the agency, it was apparent that the agency improvements and the White River Valley lay north of the line Miller was running. Immediately and for the first time the Indians became uneasy since they feared that the agency improvements and the White River Valley, which they had "occupied as a home for years" were to be taken from them (R. 17). In contrast to the responsible Government officers' flat rejection of the Indians' earlier claims to Douglass Creek, North Park and Bear River Valley, the right of the Indians to White River Valley was instantly recognized. Miller announced on the ground to the agent and two leading Chiefs "that he was not running the [northern] boundary line and that their [the Ute] line would be found to run from 15 to 18 miles north of the agency building" (R. 17). And in reporting the incident to the Commissioner the agent pointed out that he and his predecessors had informed the Indians that the White River Valley "was still theirs, and would not be taken from them" (R. 17).

The Indians' right to the White River Valley was promptly recognized in Washington by the Commissioner of Indian Affairs, at whose instance the Executive Order of 1875 was issued.

In advising the agent of the issuance of the Executive Order the Commissioner stated: "This action fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged" (R. 20).

This history clearly demonstrates that at the time the Executive Order of 1875 was issued the Indians did not understand they owned the lands described in the Executive Order and there is nothing in the record showing that they ever were informed that they owned those lands. What the Indians did understand, and correctly, is that they owned the White River Valley.[10]

What problem did the President and the Secretary of the Interior intend to remedy by issuing the Executive Order of 1875? The only problem they considered was the one presented to them by the Commissioner. While the Commissioner's objective in requesting the Executive Order was to protect the Indians in their possession of White River Valley (See Statement, *supra*, p. 12), he made no reference to the

[10] It is significant that petitioners nowhere clearly explain that the Executive Order of 1875 in fact covered lands wholly north of the White River Valley. Their brief paints the picture (Br. 6) that the Executive Order embraced the White River Valley. Furthermore, there is no evidence that petitioners ever settled on or in any way improved the executive-order lands.

fact that Miller's survey was erroneous, but on the contrary gave the Secretary the unmistakable impression that the agency improvements and the White River Valley lay north of the true north treaty-boundary. It was with this understanding of the problem that the Secretary recommended and the President issued the Executive Order of 1875. This history clearly demonstrates that the Secretary and the President in issuing the Executive Order believed that the executive-order lands embraced the White River Valley and the agency improvements. Thus, we have a situation where both the Indians and the Executive thought that the lands described in the Executive Order embraced the White River Valley when in fact they did not—a clear case of mutual mistake. Under these circumstances, even assuming the President had the power to convey these lands, there is absolutely no basis for attributing to the President an intention to transfer title to the lands described in the Executive Order, nor is there any basis for assuming (as petitioners do) that the Indians understood they were receiving title to the executive-order lands. It was the understanding of all parties that the Executive Order dealt with the White River Valley lands.

Even in the absence of mutual mistake, there is another reason why the Executive Order of 1875 should not be construed as vesting the Utes with a compensable interest in the lands. That

order was issued at about the same time and is in terms identical with the orders passed upon in *Sioux Tribe* v. *United States*, 316 U. S. 317, 320. As this Court there observed (p. 327), it was the consistent administrative understanding that such orders (including those setting aside areas for the use and occupancy of Indians as distinguished from the liquor-suppression purposes for which the Sioux orders were issued) conferred on the Indians rights "different from and less than their rights and interests in treaty or statute reservations." This Court relied on administrative expressions to the effect that the Indians had "no assurance for their occupation of these [Executive Order] lands beyond the pleasure of the Executive," and that the Indians "are mere tenants at will, and possess no permanent rights to the lands upon which they are temporarily permitted to remain." There is nothing to show that in issuing the Executive Order of 1875 for the Utes the President departed from the uniform administrative understanding which prevailed at the time the order was issued. It follows that even if it be assumed that the President was empowered to transfer title by Executive Order, there was no intention to exercise it.

The Executive Order of 1875 did not achieve the intended objective of protecting the possession of the Indians in the White River Valley. Whites continued to intrude upon the valley lands and

the reason for the intrusion was that the whites regarded the erroneous Miller line as fixing the northernmost limits of the Ute reservation. Consequently the problem resulting from the erroneous Miller line again confronted the government officers in 1877. The ensuing correspondence[1] makes evident that those officers recognized that the Miller survey was in fact erroneous and that there could be no real and permanent solution of the problem without a correct survey of the north treaty-boundary.

On May 7, 1877, the agent urged upon the Commissioner that the Miller mistake should be "officially rectified by authorities in the Land Office; that correct maps indicating the true position of the northern boundary of the Ute Reserve * * *" should be circulated widely. The agent called attention to the boundary as being plainly defined *in the treaty* as fifteen miles north of the fortieth parallel of latitude (R. 34). The Commissioner replied on May 23, 1877, by sending the agent a copy of the Executive Order of 1875 and commenting that, regardless of the accuracy of the Miller line, the Executive Order operated to exclude intruders from lands south of the north line of the executive-order lands

[1] This correspondence appears in Senate Executive Document No. 29, pp. 41–45, January 7, 1880, 46th Congress, 2d session, and is quoted in Judge Littleton's concurring opinion at R. 31–35.

(R. 32). The agent, obviously irritated by the Commissioner's seeming miscomprehension of the situation, explained in his letter of June 11, 1877, that the problem required action to prevent trespass, not to remove trespassers after they settled (Sen. Ex. Doc. No. 29, *supra*, p. 42). He recited that "the white people in the neighborhood of the northern portion of the reservation" were preparing to move into the White River Valley, that "Efforts are being made to raise colonies to settle in the White River Valley," that sixty families were reported *en route*, and that others were hunting and prospecting for gold. He again put the blame on the mistakes of the Miller survey and again vigorously urged the Indian Office to publish widely the "true boundaries of this reservation" (R. 33–34).

The agent's letter finally moved the Commissioner to bring the matter before the Secretary of the Interior by letter of July 5, 1877, calling attention to the error in the Miller survey and to the fact that the Miller line did not conform to the treaty boundary. For the first time then, the Secretary was advised that the Miller line was erroneous and was "south of the fortieth parallel of north latitude, instead of fifteen miles north thereof, as provided by treaty of March 2, 1868 * * * ". In this same letter the Commissioner characterized the intrusion of whites

upon the White River Valley as "a flagrant violation of their [Utes] clear treaty rights". The Commissioner advised the Secretary that following the Miller survey the whites began to invade the White River Valley under color of that survey and recommended "a resurvey in lieu of that executed by Miller, so as to conform to the boundaries defined in the treaty." He also recommended that a military force be sent to the White River Valley "to insure the faithful observance of the treaty stipulations with the Utes" (R. 34–35). Throughout their correspondence the agent and the commissioner placed emphasis on the treaty boundary and on the urgency of a correct survey of that boundary. This confirms the view that the Executive Order of 1875 was not intended as an irrevocable revision of the north line defined in the treaty.

The events subsequent to 1875 reflected by this correspondence confirm the 1875 understanding of both the Indians and the Government that the Executive Order of that year was intended to deal only with the lands of the White River Valley. From this it follows that there could have been no understanding or intention on the part of the Government to convey to the Indians the lands described in the Executive Order of 1875.

---

[11] With the enactment of the 1880 Act the need for a new survey of the north treaty-boundary was obviated.

II

THE ACT OF 1880 DID NOT COMMIT THE UNITED STATES TO COMPENSATE PETITIONERS FOR THE EXECUTIVE ORDER LANDS

Petitioners undertake to supply in this case what was lacking in the *Sioux* case, namely, a Congressional recognition of a compensable interest in the executive-order lands. For this they rely on the subsequent Act of June 15, 1880, 21 Stat. 199, as conveying the executive-order lands to them (Br. 23). This position is without support.

The terms of the 1880 Act, its legislative history and its administrative construction show no Congressional intent to compensate petitioners for the lands described in the Executive Order of 1875.—The Act contains no language which expresses such an intent. The purpose of that Act was not to vest title of any nature in any lands in petitioners, but to convey to the United States lands owned by the Utes in Colorado. The undertaking of the United States to compensate petitioners is embodied in section 3 of the Act (Appendix, pp. 56–57). After providing that allotments in severalty be made, the Act recites that "all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to

be public lands of the United States" and provides for their sale for the account of petitioners. Words could hardly be clearer. Since petitioners had no title to the lands in controversy under the Executive Order of 1875, and since the 1880 Act contains no language vesting petitioners with title, Congress could not have had those lands in mind when it referred to land "the title to which is * * * released and conveyed to the United States."

Petitioners assert that the Indians did not understand the meaning of the word "title" used in the 1880 Act (Br. 18–21). First, there is nothing in this record showing that the Indians did lack understanding. Counsel's unsupported assertions cannot supply this deficiency. Secondly, to accept petitioners' argument would mean that whenever the word "title" is used in an act of Congress or treaty relating to Indians, it must be unilaterally construed as counsel for the Indians afterwards say they understood or misunderstood it, regardless of the intention of the United States. This has never been the rule, and a court applying such a rule would not be construing legislation but would be merely ascertaining the fact of what the Indians thought the law meant (pp. 45–48 *infra*). Thirdly, the word "title" had been used in at least three treaties with the Utes prior to the Act of 1880 (Treaty of October 7, 1863, Art. 2, 13 Stat. 673; Treaty of March 2, 1868, Art. VII, 15 Stat. 619; Act

of April 29, 1874, Art. I, 18 Stat. 36). Many of the same Indians who signed the earlier treaties on behalf of the Utes signed the agreement ratified by the Act of 1880 and presumably had engaged in the negotiations leading up to those treaties. Chief Ouray, recognized as head man of all the Ute Bands, signed all three treaties as well as the agreement ratified by the 1880 Act. Ouray could speak Spanish (the language in which negotiations generally were carried on) and was the official interpreter when the 1868 treaty was made. Our Indian Wards, George W. Manypenny (1880) pp. 406, 416. Fourthly, in 1909, at the time petitioners asserted their claims under the 1880 Act in the Court of Claims (45 C. Cls. 440), the Utes were 35 years nearer the 1880 agreement and many of them who were mature men in 1880 were presumably still available. Yet no claim was then made that the word "title" in the 1880 Act included the executive-order land. On the contrary, at that time petitioners relied solely on the 1868 treaty and affirmatively requested the court below to find that "No lands have ever been ceded to plaintiffs by the United States outside of their said reservation as defined in the treaty proclaimed in 1868 (15 Stat. at Large, p. 619 * * *);" (*The Ute Indians* v. *United States*, 45 C. Cls. 440 (1910), R. 391; 735).

The history of the 1880 Act.—An examination of the legislative history of the 1880 Act removes

all doubt as to whether Congress gratuitously was vesting the Utes with title to approximately 600,000 acres of land in addition to roughly the twelve million acres already held by the Utes, and was at the same time purchasing these 600,000 acres from the Indians. The Congress which enacted the 1880 Act was in no magnanimous mood. It had been aroused by the outbreak on the Ute Reservation on September 29, 1879, during which some of the White River Utes massacred Meeker, the Indian Agent at White River, all the agency's male employees and others, and ambushed a small detachment of military, killing a number of soldiers. Ex. Doc. No. 1, pt. 5, 47th Cong., 2d Sess. (1879), pp. 16–19, 82–97. It was that massacre which prompted an outraged Congress to introduce a number of bills and resolutions aimed at punishing the guilty Indians, extinguishing the title to all Ute holdings, and removing the Utes from Colorado.[13] It is unlikely that such a Congress was seeking to enlarge the holdings of the Utes or to bestow special favors upon them such as vesting them with title to

[13] S. 772 and S. Res. 51, both introduced December 8, 1879, 10 Cong. Rec., pt. 1, p. 30 (1879). S. Res. 51 was passed by the Senate on December 11, 1879, 10 Cong. Rec., p. 77. H. Res. 142 introduced December 9, 1879, 10 Cong. Rec., p. 44. H. R. 2420 introduced December 2, 1879, 10 Cong. Rec., p. 17. H. Res. 154 introduced December 15, 1879, 10 Cong. Rec., p. 113. H. R. 5092 introduced March 12, 1880, 10 Cong. Rec., pt. 2, p. 1538 (1880).

extensive lands to which they had no legal claims."[14] It was seeking, first, vindication for the Meeker massacre, and second, removal of the Utes and expeditious elimination of their holdings in Colorado.

The first business of the Act (sec. 1) concerns the apprehension of the Indians implicated in the Meeker and White River murders. The temper of Congress toward the White River Utes, whom it considered primarily responsible for the massacre, is evidenced by the provision that the proportion of the money coming to those Indians was not to be paid until the guilty parties had surrendered or had been apprehended, or until the President was satisfied they were no longer living or were beyond the limits of the United States. Congress further displayed its animus toward the White River Utes by charging their portion of the moneys with the annuities allowed to the heirs of those murdered in the massacre. Yet petitioners undertake to persuade the Court that in this same act, Congress, as a matter of benevolence, bestowed upon the Utes title to 600,000 acres of public land and agreed to account to them for the land.

There is no basis whatever in the legislative history for the conclusion that Congress intended

[14] Petitioners' argument (Br. 30–35) that the Utes were without blame in the Meeker massacre, even if true, is irrelevant. Congress considered them responsible and the important thing is the frame of mind of the Congress which enacted the 1880 Act.

in the 1880 Act to deal with the executive-order land. The proposed legislation was considered by the Committees on Indian Affairs of both the Senate and the House; it was debated for seven days on the floor of the Senate and for one day in the House; it was then considered by a joint conference committee.[15] Nowhere in the legislative annals is there a single word in any way indicative of an intent to vest the Utes with a compensable interest in the lands covered by the Executive Order of 1875. That order was at no time mentioned, let alone considered by Congress, although there was discussion of items and matters of far less consequence.

This legislative history does not comport with Judge Whitaker's view (R. 28) that Congress had in mind the executive-order land when it used the language contained in section 3 of the 1880 Act. The history shows those lands were never even mentioned. However, if Congress did, as Judge Whitaker thought, have these lands in mind, then certainly the language employed in section 3 cannot be reconciled with an undertaking on the part of Congress to purchase them.

Petitioners point to the phraseology of the first section of the agreement incorporated into the 1880 Act (Br. 23). That section recites that the

[15] 10 Cong. Rec., pt. 3, pp. 2027–2030, 2058–2067, 2121–2130, 2152–2164, 2189–2202, 2221–2228, 2249–2252, 2253–2268, 2309–2320 (1880), idem., pt. 5, pp. 4251–4263, 4461–4465, 4487 (1880); H. Rep. No. 1401, 46th Cong., 2d sess. (1880).

chiefs and headmen agree to use their best endeavors to procure the consent of their people to the cession of all the territory of the "present Ute Reservation". Petitioners rely heavily on the word "present" as including the 1875 executive-order lands. There is nothing to indicate that Congress understood that expression as including the executive-order lands. And petitioners have failed to adduce any evidence that the Indians so understood it. A more natural inference is that the word was used to describe the tribal holdings in 1880 as distinguished from the holdings in 1868, bearing in mind that in 1873 the Indians had ceded some three million acres of the 1868 treaty reservation. Agreement of September 13, 1873, ratified by the Act of April 29, 1874, 18 Stat. 36, 1 Kappler 151, Fdg. 4, R. 12. In any event, in the teeth of the explicit language of section 3 of the Act and in the absence of any affirmative showing in the history of the legislation that Congress had the executive-order lands in mind, the mere use of the phrase "present Ute Reservation" is not strong enough to warrant a holding that Congress understood the term as including executive-order lands.

In view of the circumstances which provoked the passage of the 1880 Act and the general temper of the Congress which enacted it, if it had been intended by that Act to vest the Utes with 600,000 acres of public lands, surely Congress

would have expressed that intent in clear and apt words. The absence of such language is fatal to petitioners' case. Certainly, nothing in the purpose, language, or history of the 1880 Act supports the argument that Congress can be charged with an intent to transfer title to the executive-order lands by mere implication founded on the labored construction petitioners urge this Court to place upon the phrase "present reservation".

The administrative construction.—As the court below pointed out (R. 28), the administrative officers charged with carrying out the 1880 Act did not construe it to mean that the lands described in the Executive Order of 1875 were to be sold for the account of the Indians. Implementation of the 1880 Act was provided for in the Act of July 28, 1882, c. 357, 22 Stat. 178. That Act stated that petitioners' reservation "be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after the passage of this Act, in accordance with the provisions and under the restrictions and limitations of" the 1880 Act (R. 22). A few days later, on August 4, 1882, the President by Executive Order directed that the land "withdrawn from sale and set apart for the use of the several tribes of Ute Indians by Executive Order dated November 22, 1875, be, and the same hereby is restored to the public domain" (Fdg. 15, R. 23).

This was the customary phraseology employed

in Executive Orders restoring to the public domain lands previously set aside by Executive Order for Indian use. See *Sioux Tribe* v. *United States*, 316 U. S. 317. As this Court there stated (p. 330): "It was a common practice, during the period in which reservations were created by Executive Order, for the President simply to terminate the existence of a reservation by cancelling or revoking the order establishing it". The fact that the same practice was followed in this case is an unequivocal expression of the administrative understanding that these lands were no different than the hundreds of other executive-order reservations. If the administrative officials had entertained the view that the 1875 executive-order lands were within the 1880 cession, no Executive Order of restoration would have been necessary since the Act of July 28, 1882, had already incorporated into the public domain all lands ceded to the United States by the Indians in the 1880 Act. The issuance of the Executive Order of 1882 clearly shows the administrative view that the 1875 executive-order lands were not covered by the 1880 Act since the executive-order lands were simply "restored to the public domain" while the lands ceded by petitioners were by statute (1882 Act) to be subject to disposal in accordance with the 1880 Act which embodied restrictions and limitations on sale not applicable to public domain lands.

Petitioners' contentions, based upon the asserted understanding of the parties, are without merit.—Counsel for petitioners state that the Indians understood both that they owned the executive-order lands and that by the phrase "present reservation" in the 1880 agreement they were ceding them to the United States, and further, that the United States knew of the Indians' understanding (Br. 16–17; 23). These statements are nothing more than unsupported assertions. The facts are to the contrary (See *supra*, pp. 7–13; 26–33). No evidence was adduced to support these assertions. Counsel rely solely on statements in the opinion of Judge Whitaker in the court below. First, they quote the excerpt that the Indians "in all probability believed that they [the executive-order lands] were as much a part of their reservation as were the lands set aside by the Treaty of March 2, 1868.". And they stress the assertion that "they [the Indians] no doubt believed that they were ceding to the United States these lands as well as others" (R. 26, Br. 16).

Both quotations are mere speculations on the part of Judge Whitaker. The record contains no proof to support his statements, and there is not and cannot be a finding that the Indians had such an understanding. "The deficiency in findings cannot be rectified by statements in the opinion." *United States* v. *Causby*, — U. S. — October Term, 1945, No. 630.

As already shown, neither the Indians nor the Government had in mind the lands actually covered by the Executive Order of 1875. Both understood that order to embrace the White River Valley lands. In view of this mutually mistaken comprehension of the situation neither the Indians nor the Government could have understood the Executive Order to pass an interest in any lands other than those in the White River Valley. Moreover, the fact that petitioners made no claim for these lands in 1910, when they sued in the Court of Claims under a jurisdictional act authorizing them to litigate their "claims and rights" under the 1880 Act, is itself evidence that the Indians as of that earlier date did not regard the executive-order lands as within the 1880 cession (Fdg. 17, R. 23, and see pp. 48–51 *infra*).

Petitioners also quote (Br. 17) Judge Whitaker's statement that "Congress knew they [petitioners] probably considered these executive-order lands a part of their 'present reservation.'" Here again there is neither evidence nor a finding that Congress had such knowledge. Obviously Judge Whitaker's expression is simply his speculation as to the reason Congress used the language it did. But the legislative history of the 1880 Act as hereinbefore shown (pp. 34–39 *supra*) demonstrates that the matter of the executive-order lands was never considered by Congress.

Petitioners assert that in construing statutes or treaties dealing with Indians, the under-

standing of the Indians is the controlling factor (Br. 17).[16] There is no proof that either the Indians or the United States understood that the executive-order lands were to be embraced in the 1880 act. Petitioners' rule of construction would mean that the asserted understanding of the Indians must prevail, regardless of the terms of the statute or the intention of the United States. That contention was rejected in *Shoshone Indians* v. *United States*, 324 U. S. 335, where this Court considered the same line of cases presently relied upon by petitioners (Br. 17–18). It was there stated (p. 353):

> Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian of the Indians, to our ward's prejudice. "All doubts," say petitioners, "must be resolved in their [the Indians'] favor." Mr. Justice McLean, concurring in *Worcester* v.

[16] It is interesting to note that petitioners have already accepted the benefit of the opposite view. Prior to survey of the eastern boundary of the reservation, both the Indians and the whites thought that boundary was "some miles" west of where it actually turned out to be, and whites moved upon an easterly strip actually within the treaty reservation. Sen. Ex. Doc. No. 108, 47th Cong., 1st sess. (1882), p. 2. The Senate Committee on Public Lands, in reporting out the bill subsequently enacted as the Act of July 28, 1882, c. 357, 22 Stat. 178, spoke of the Indians having disclaimed any right to these lands. Sen. Rept. 186, 47th Cong., 1st sess.) p. 30. Petitioners nevertheless sued in the Court of Claims on the basis of the boundary as fixed in the 1868 Treaty. 45 C. Cls. 441.

> *Georgia*, 6 Pet. 515 at 582, said, "The language used in treaties with the Indians should never be construed to their prejudice." But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.

See also *Choctaw Nation* v. *United States*, 318 U. S. 423, 432; *Creek Nation* v. *United States*, 318 U. S. 629, 634, 640; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *United States* v. *Choctaw and Chickasaw Nations*, 179 U. S. 494, 500.

Thus, this Court has made clear that it is not the rule that in dealing with Indian treaties and statutes the courts are to ignore the clear terms thereof and apply the agreements as the Indians understood them. As this Court said in *Choctaw Nation* v. *United States*, 318 U. S. 423, 432: "But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted

understanding of the parties." Acceptance of petitioners' contention here would require expansion of the 1880 agreement beyond its terms in the face of a legislative history which negatives any such intention by Congress. Ordinarily the making of a gift by Congress can be established only by plain language indicating such intention. *District of Columbia* v. *Johnson,* 165 U. S. 330, 338. But here petitioners seek to secure a gratuity by now asserting that some sixty years ago their ancestors were being so favored. Certainly, the rule of liberal construction of Indian treaties and statutes does not mean that the courts need only ascertain the unilateral understanding of the Indians. It would indeed be generous of the courts to accept without question whatever petitioners presently assert, without proof, was the understanding of their ancestors sixty years ago. "Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress." *Shoshone Indians* v. *United States,* 324 U. S. 335, 353.

III

PETITIONERS' CLAIM IS BARRED BY RES JUDICATA

Since the Court of Claims held against petitioners upon the merits, it found it unnecessary to pass upon other defenses presented by the

United States (R. 28). The Government submits that the judgment of the court below should be affirmed for the additional reason that the judgment entered by the Court of Claims in 1910 is *res judicata* of the present claim (R. 24; *Ute Indians* v. *United States*, 45 C. Cls. 440).

The Act of March 3, 1909, c. 263, 35 Stat. 781, 788–789, conferred power on the Court of Claims to hear, determine and render judgment on the claims and rights of petitioners under the agreement of 1880 "including the value of all lands ceded by the said Indians which have been set apart and reserved from the public lands as public reservations or for other public uses". Suit was brought pursuant to that Act to recover "for the failure of the United States to dispose of the lands ceded by the agreement of 1880, for an accounting for the lands sold, and to recover compensation for the lands reserved by the United States for public purposes" (Fdg. 17, R. 23–24). After the deduction of allowable offsets judgments totalling $3,516,231.05 was entered for petitioners. *Ute Indians* v. *United States*, 45 C. Cls. 440; 46 C. Cls. 225.

If there is any validity to petitioners' claim that their right to payment for these lands arose from the 1880 act, then the claim falls squarely within the provisions of the 1909 Act and should have been presented and adjudicated in the earlier case. The Jurisdictional Act of 1938

as amended in 1941 under which the present case was brought expressly waives the defenses of lapse of time or limitations (R. 6), but does not waive the defense of *res judicata*. While the Act confers jurisdiction to determine "legal and equitable" claims, a claim previously adjudicated is not open for redetermination under such a jurisdictional act. *Duwamish et al. Indians* v. *United States*, 79 C. Cls. 530, 592; cf. *Klamath Indians* v. *United States*, 296 U. S. 244, 250. The 1910 judgment is, therefore, *res judicata* of the present case.

It is true that in the litigation resulting in the 1910 judgment none of the lands for which petitioners were compensated lay north of the true boundary described in the treaty (R. 24). But the failure of petitioners then to assert the present claim will not permit them to escape the bar of *res judicata*. It is well settled that if a second action is upon the same claim as that upon which judgment was previously rendered, the judgment is an absolute bar, not only of what was decided, "but also as to every ground of recovery which might have been presented." *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *Bates* v. *Bodie*, 245 U. S. 520, 526; cf. *United States* v. *California & Ore. Land Co.*, 192 U. S. 355. This view is supported by the legislative history of the 1909 Act which shows that the intention was to determine finally

the amount of money due the Indians under the 1880 agreement. 43 Cong. Rec. p. 2776.[17]

Petitioners cannot avoid the effect of the 1910 judgment on the ground that here reliance is placed on the Executive Orders of 1875 and 1882 and the prayer is for the value of land as for a taking rather than for an accounting. "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 321. If the 1880 Act is eliminated from petitioners' case, there is no cause of action. Under the 1880 act all lands not reserved by allotment were released and conveyed to the United States and provision was made for the payment to petitioners. Hence, if petitioners' argument that the words "present reservation" in the 1880 act is accepted, it follows that under that act the executive-order lands were conveyed to the United States in 1880. Accordingly, those lands were covered by the claim asserted in the earlier litigation and the

[17] The portion of the Indian Appropriation Act of March 3, 1909, which gave the Court of Claims jurisdiction to hear, determine, and render judgment in this matter was added in the Senate Committee on Indian Affairs as an amendment to the bill passed by the House. Sen. Rep. No. 1036, 60th Cong. 2d sess. (1909), p. 2; 43 Cong. Rec. pt. 3, pp. 2769–2770, 2775–2776. The conference report recommended agreement to the amendment as amended in conference, and the conference report was agreed to. 43 Cong. Rec. pt. 4, pp. 3064–3065, 3320–3323.

judgment rendered in 1910 is *res judicata* of the claim here presented for the identical lands.[18]

CONCLUSION

It is respectfully submitted that, for the reasons stated, the judgment of the Court of Claims should be affirmed.

GEORGE T. WASHINGTON,
Acting Solicitor General.
DAVID L. BAZELON,
Assistant Attorney General.
MARVIN J. SONOSKY,
ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys.

DECEMBER 1946.

[18] It is noteworthy that in the legislative history of the Special Jurisdictional Act of June 28, 1938, c. 776, 52 Stat. 1209, no mention is made of the executive-order claim. (H. Rep. No. 1028, 75th Cong. 1st sess.; S. Rep. No. 1219, 75th Cong. 1st sess.)

APPENDIX

Sections 1 and 6 of the jurisdictional Act of June 28, 1938, 52 Stat. 1209, 1210, read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred on the United States Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent [1] band thereof, may have against the United States, including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the failure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United States, or any misfeasance or nonfeasance on the part of the United States with respect thereto, or otherwise.

* * * * *

[1] So in original.

SEC. 6. If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and set apart and reserved as national reservations or for other public uses or otherwise classified, reserved, or withdrawn from entry and sale under the public land laws or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources, anything in any other Acts of Congress to the contrary notwithstanding, no lands in Colorado north of and including range 35 formerly owned or claimed by the Ute Indians or any band thereof shall be restored to tribal ownership under the provisions of section 3 of the Act of June 18, 1934 (48 Stat. 984), and said lands to the extent that they have not been disposed of by the United States are hereby declared to be the absolute property of the United States: *Provided*, That there is hereby added to the existing Southern Ute Indian Reservation in tribal ownership of the vacant, undisposed of ceded lands within the following described boundaries:

* * * * *

The Act of July 15, 1941, 55 Stat. 593, amending the above quoted jurisdictional act, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 6 of the Act entitled "An Act conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any tribe or band thereof may have against the United States, and for other purposes", approved June 28, 1938, is hereby amended by striking out the words "anything in any other Acts of Congress to the contrary notwithstanding" and inserting in lieu thereof a period and the following: "Anything in any other Acts of Congress to the contrary notwithstanding"; by striking out "range 35" wherever it appears in such section and inserting in lieu thereof the following: "township 35 north"; by striking out the word "of" following the word "ownership" appearing in the first proviso of the said section; and by striking out the word "constitutent" in section 1 and inserting in lieu the word "constituent".

Articles II and III of the Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, read as follows:

> ARTICLE 2. The United States agree that the following district of country, to wit: Commencing at that point on the southern boundary-line of the Territory of Colorado where the meridian of longitude 107° west from Greenwich crosses the same; running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north

latitude; thence due west to the western boundary-line of said Territory; thence south with said western boundary-line of said Territory to the southern boundary-line of said Territory; thence east with said southern boundary-line to the place of beginning, shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, except as herein otherwise provided.

ARTICLE 3. It is further agreed by the Indians, parties hereto, that henceforth they will and do hereby relinquish all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined in the preceding article.

The Executive Order of November 22, 1875, 1 Kappler 834, reads as follows:

It is hereby ordered that the tract of country in the Territory of Colorado lying within the following-described boundaries, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence

running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to the present reservation in said Territory.

Section 3 of the Act of March 6, 1880, 21 Stat. 199, 201, 203–204, 1 Kappler 180, 185, reads as follows:

SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement above mentioned, and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions, and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said

agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold, the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: *Provided further*, That the subdivisions upon which are located improvements to be appraised, as provided for in section two of this act, shall be offered to the highest bidder at public sale, after published notice of at least thirty days by the Secretary of the Interior, and the same shall be absolutely reserved from occupation or claim until so sold.

The Executive Order of August 4, 1882, 1 Kappler 834–835, reads as follows:

> It is hereby ordered that the following-described tract of country in Colorado, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, withdrawn from sale and set apart for the use of the several tribes of the Ute Indians by Executive order dated November 22, 1875, be, and the same hereby is, restored to the public domain.

DEPARTMENT OF
THE INTERIOR
GENERAL LAND OFFICE
Washington, D. C. Aug 22, 1873

Special Instructions

ROBERT C. DARLING
U. S. Surveyor & Fort Supply, Idian Territory.

Survey of Eastern Bdy of Ute Indn. Reservation

Having entered into contract on this day for the survey of the Eastern boundary of the Tabequache, Muache, Capote, Weeminuche, Yampa, Grand River and Uinta Bands of Ute Indians, as described in the Second Article of the treaty concluded March 2, 1868,

Copy sent to First Comptroller U. S. Treasury Aug 27.

you will be governed by the terms of said contract and these instructions in the execution of the service contracted for.

The boundary to be surveyed and marked, begins on the 37th parallel of North latitude where the 107th Meridian of West longitude intersects the same and runs due North with said Meridian to a point fifteen miles North of where said Meridian intersects the 40th Parallel of North latitude.

The geographical points just mentioned being susceptible of approximate ascertainment from data of record in this office, it will not be absolutely necessary on your part to determine them by actual astronomical observations, but in order to carry out your contract, you will consider the corner established by Ehud N. Darling, Astronomer and Surveyor, at the intersection of the right bank of the Navajoe river with the 37th parallel of North latitude situated between the 223d & 24th miles of the North boundary of the Territory of New Mexico, as per diagram herewith marked "A".

You will consider said corner or the point of the intersection as aforesaid at the initial point of the Eastern boundary of the Ute Indian Reservation which you will commemorate by a conspicuous and enduring monument,

describing it fully in your field notes of survey, so that it may be readily identified by the Indians and other parties interested in the matter.

You will inscribe on the post denoting the Initial point on its Eastern face "37° N. L." on the Southern "N. M.", for New Mexico, on the Western face of the post "S. E. cor. Ute Res" for the South East corner of the Ute Reservation, and on the North face of the post, "E. By. U. R." for the East Boundary of the Ute Reservation.

You will furthermore perpetuate the Initial point of the Reservation by digging two pits on its Southern and Eastern Boundaries at a distance of 10 feet from the base of the mound surrounding the corner; the pits to be two feet square and 18 inches deep, if practicable.

The monument thus erected will be witnessed by as many permanent objects with bearings and admeasured distances from the same, if within five chains therefrom.

After you shall have thus established and conditioned the Initial point of the Ute Reservation, you will next survey, run and mark the Eastern boundary thereof by blazing the line through timber land, planting mile monuments with such material as the country through which you pass will afford,

selecting durable and conspicuous sites for the same.

In case your line passes over abrupt and insurmountable features of the country, presenting obstacles to chaining and marking it, you will determine distances by triangulations, recording the method in your field notes of survey for future reference, as well as describing the size and locality of mile posts or stone monuments.

It is important that the boundary be marked in the field with palpable evidences thereof, and especially in Valleys and where it crosses roads, rivers and other thoroughfares, whether such points coincide with regular mile distances or not.

In thus prosecuting the survey you will mark the mile monuments by inscribing on their East faces 1873, on the West "U. R. for the Ute Reserves, on the North, "E. By. for the East Boundary and on the South face "107° N. L."

In order to keep yourself on the due north course from the Initial point to the terminal point of the Eastern Boundary of the aforesaid Ute Indian Reservation, coinciding with the 222d mile from the said Initial point, you will endeavor to check your due north course by the most approved method used for the purpose. The terminal

mile point you will perpetuate with monument similar to that required to be erected at the Initial point, marking it on its West face "N. By. U. R" for the North Boundary of the Ute Reserve, on the South "E. By. U. R." on the North "107° N. L.", and on the East 1873, and digging the pits of the prescribed size and distance from the base of the terminal or 222d mile corner on the west and south sides thereof.

You will make note of the principal topographical features of the country on both sides of the line, so that you may be enabled to designate their positions on the maps of the boundary which you are required to furnish this office in triplicate on the completion of your work, together with triplicate field notes of the survey.

You will provide yourself with appropriate instruments and chains of standard measure, and pay vigilant attention to the chaining of the line, comparing frequently your working with the Standard Chain, as upon the faithful and careful admeasurement of the boundary, its correctness depends.

It is expected that you will prosecute the work contracted for with due diligence, looking to its completion within the time specified in your contract.

The returns of your survey must be rendered in triplicate, and in proper manner as is required by the printed Manual of Surveying Instructions, copy of which is sent you herewith, together with your account of service; all of which if found by this office to have been correctly performed, will be adjusted and reported for payment to the First Comptroller of the U. S. Treasury, with the request that draft or drafts in your favor may be sent to such place as you will indicate in the face of the account.

WILLIS DRUMMOND
Commissioner

RECORDS OF THE GENERAL LAND OFFICE.
Record Copies of Letters sent to
Surveyors General, Volume 27.
THE NATIONAL ARCHIVES,
Washington, D. C.

We hereby certify that we have assisted Robert C. Darling, Surveyor in surveying the Eastern Boundary of the Ute Indian Reservation of Colorado, from the 37th Paralel of N. Latitude: North to a point 15 miles North of the 40th Paralel, coresponding to the 222 mile corner, and that said Boundary has been in all respects to the best of our knowledge and belief well and faithfully surveyed, and the boundary

monuments planted according to the instructions furnished by the Commissioner of the General land office.

(middle initial
BERNARD unintelligible) JONES
JNO. LLOYD
JOHN B. SEARCH
JOHN P. DARLING

Sworn to and subscribed before me this 21st day of December 1873.

ALBERT B. JONES
Notary Public

I R. C. Darling do solemnly swear that in pursuance of a contract with the Hon. Willis Drummond Commissioner of the Gen'l Land Office dated Washington, D. C. Aug. 22nd 1873 I have faithfully surveyed and established the East boundary of the Ute Indian Reservation in the Territory of Colorado and that the foregoing are the true field notes of said survey.

ROBERT C. DARLING
U. S. Surveyor

Sworn to and subscribed before me this 11th day of February, 1874.

(Notary's name unintelligible)
Notary Public

DEPARTMENT OF
THE INTERIOR.
GENERAL LAND OFFICE.
February 17th 1874

The foregoing field notes of the survery of the East Boundary of the Ute Indian Reservation in Colorado Territory, executed by R. C. Darling, U. S. Surveyor, under his contract with the Commissioner of the General Land Office, dated August 22nd 1873, having been examined and found correct are hereby approved.

WILLIS DRUMMOND
Commissioner

DEPARTMENT OF
THE INTERIOR
GENERAL LAND OFFICE
Washington, D. C. Oct. 2, 1874

JAMES W. MILLER Esq.
Leavenworth Kansas

Special Instruct Survey of Ute N. Bdy & Boundaries of Ute ceded lands
See to Mr. Miller June 16, 1875 ($15,000-additional)

SIR: The Hon. Secretary of the Interior having directed the survey of the Northern line of the Ute Reservation in Colorado, as fixed by Treaty of March 2, 1868 and also the boundary lines of the Territory ceded by the Utes, and having designated you as the

surveyor, you will be governed by the terms of the Contract entered into by you on the 26th inst. and also by these instructions in the execution of the work contracted. In running the north line of the original Reservation you will commence at the 222nd mile post of the East Boundary of said Reserve which is the northeast corner thereof and run due west one hundred and nine miles where you will establish the northwest corner of the Ute Reservation.

The boundary lines of the *ceded* Territory which you are to run are the South, West and North described as follows:—"Beginning at a point on the Eastern Boundary of said Reservation fifteen miles due North of the Southern boundary of the Territory of Colorado, and running thence west on a line parallel to the said southern boundary to a point on said line twenty miles due East of the Western boundary of Colorado Territory; thence North by a line parallel with the western boundary to a point ten miles north of the point where said line intersects the 38th Parallel N. L. thence East to the Eastern Boundary of the Reservation—"

In surveying the outboundaries of the ceded lands you will start from the S. E. corner of the Ute Reservation, which is 3 chs 13 lks West of the 223rd

mile of the North Boundary of New Mexico, thence proceed due north to the 15th mile post of the Ute E. Bdy. or should you identify this mile post you can start from it, and then run measure and mark the line due west 90 miles and 53 chains, thence north 64 miles, thence east to the eastern Bdy of the Reservation—

For a description of the corners mentioned see an extract from the field notes herewith together with a sketch of the east boundary of the Ute Indian Reservation—By the agreement of Sept. 13, 1873, at the convention of Utes, all of Uncompahgre Park is to be excluded from the ceded lands. If, therefore, in running the last mentioned north line of the ceded lands you find it necessary to offset to the south to exclude said Park, you will do so sufficiently to exclude all the Park, which having done you will regain and continue your line to the East Boundary of the Reservation.

Uncompahgre Park.

After you shall have identified the initial point of the north boundary of the Ute Indian Reservation, marked as the 222nd mile of the Eastern boundary of the same you will thence run and mark the North boundary due West blazing the line through timber land if any there be, and planting mile monuments of as durable material as the country will afford, inscribing

thereon appropriate numbers and other marks. In case the line passes over abrupt and insurmountable features of the country presenting obstacles to chaining in place and marking the boundary, you will determine distances by triangulations, recording the method thereof in your field notes of the survey, as well as describing the size and locality of the mile monuments.

It is important that the boundary should be marked in the field with conspicuous evidences of its survey and especially this requirement should be carried out in valleys and where the line crosses roads, trails, rivers and other thoroughfares, whether such points coincide with regular mile distances or not.

You will take bearings to the principal topographical features of the adjacent country on both sides of the line, so that, with approximate correctness, you can show their positions on the map with reference to the boundary.

The terminal mile point or the northwest corner of the north boundary you will perpetuate by a conspicuous monument set to the cardinal points of the compass and similar to that erected at the initial point:—You will mark on its east face "N. Bdy. Ute R" on its west face "Utah" on its north face "1874" and on its south face "W. B'dy. Ute

R."—You will fully describe the monument in your field notes—The foregoing requirements will apply equally to the survey of the boundaries of the ceded lands to the U. S. by the Utes, Sept. 13, 1873, with a slight modification.

The returns of your survey must be rendered in triplicate together with your account for the service which if found correct, the amount will be reported for payment to the First Comptroller of the U. S. Treasury with the request that draft in your favor may be sent you to such place as you may direct on the face of the account—

I have to observe in this connection that your spheres of operations under the Contract being separated at great distances and in remote fields from settlements, you will be allowed, should exigency occur, to swear your assistants to faithfully perform their respective duties before engaging them, and also to administer the final oath to them after the execution of the work, but your own affidavit to the field notes of surveys under your contract, will be made before an officer authorized to administer oaths and having an official seal to attest his act—

By direction of the Secretary of the Interior the amounts set apart for these surveys, viz. $5,000 for the original North Boundary and $10,000 for

the ceded lands must not be exceeded in the least. Said amounts to be paid out of the appropriation of $292,680, per Act Approved June 23, 1874—The instructions to you of this date, in reference to the survey of the Wind River Shoshone Eastern Band of Indians of Wyoming, will be regarded by you as applicable in the survey contemplated in these instructions, so far as they relate to your making returns of survey & employing additional compassmen—For your use in the field I send you herewith 100 blank field books and 6 copies of the Manual of Surveying Instructions.

Field note paper and blank Tp. plats will be furnished to you upon application—

You are requested to acknowledge the receipt of these instructions.

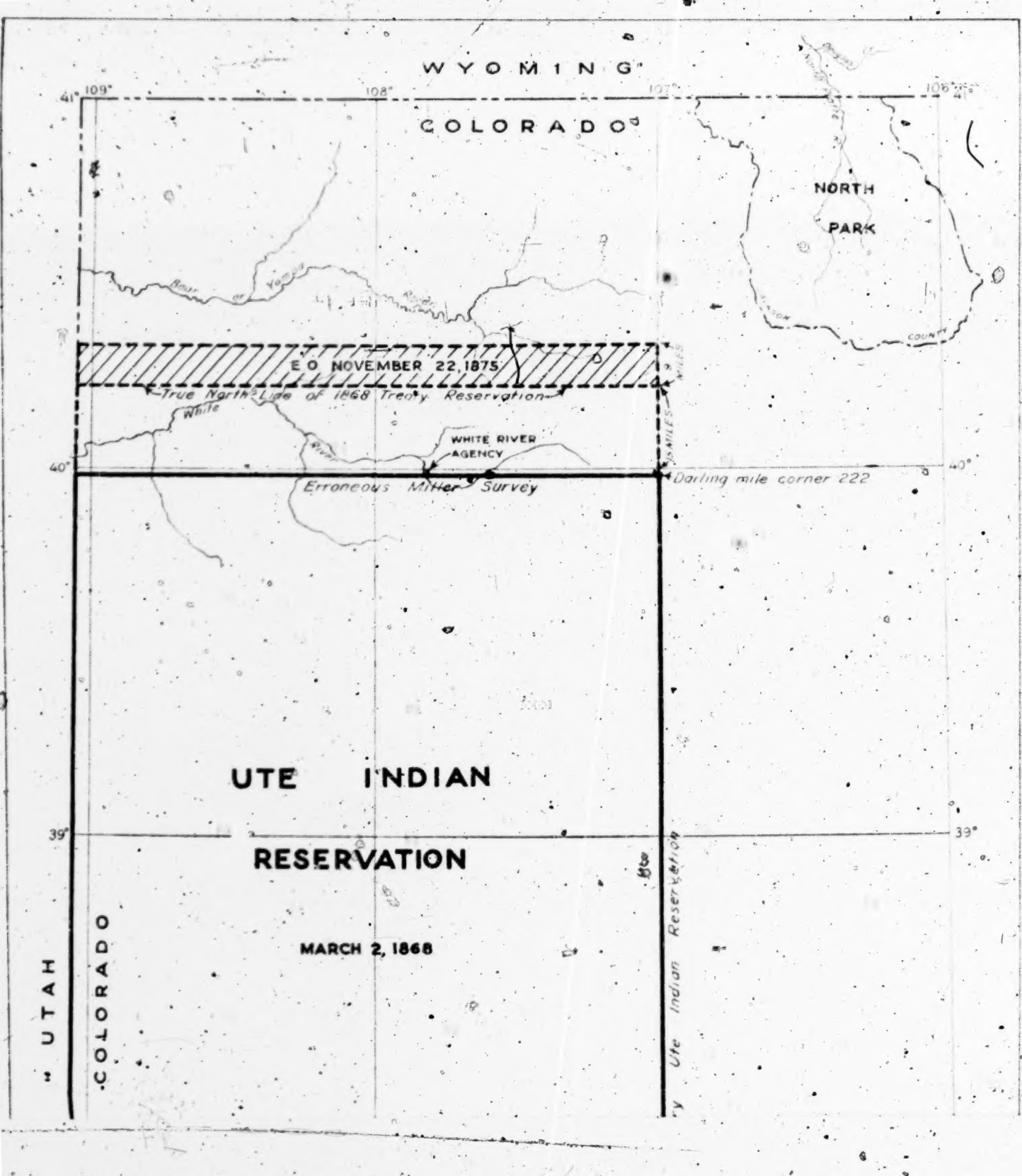
Very respectfully—

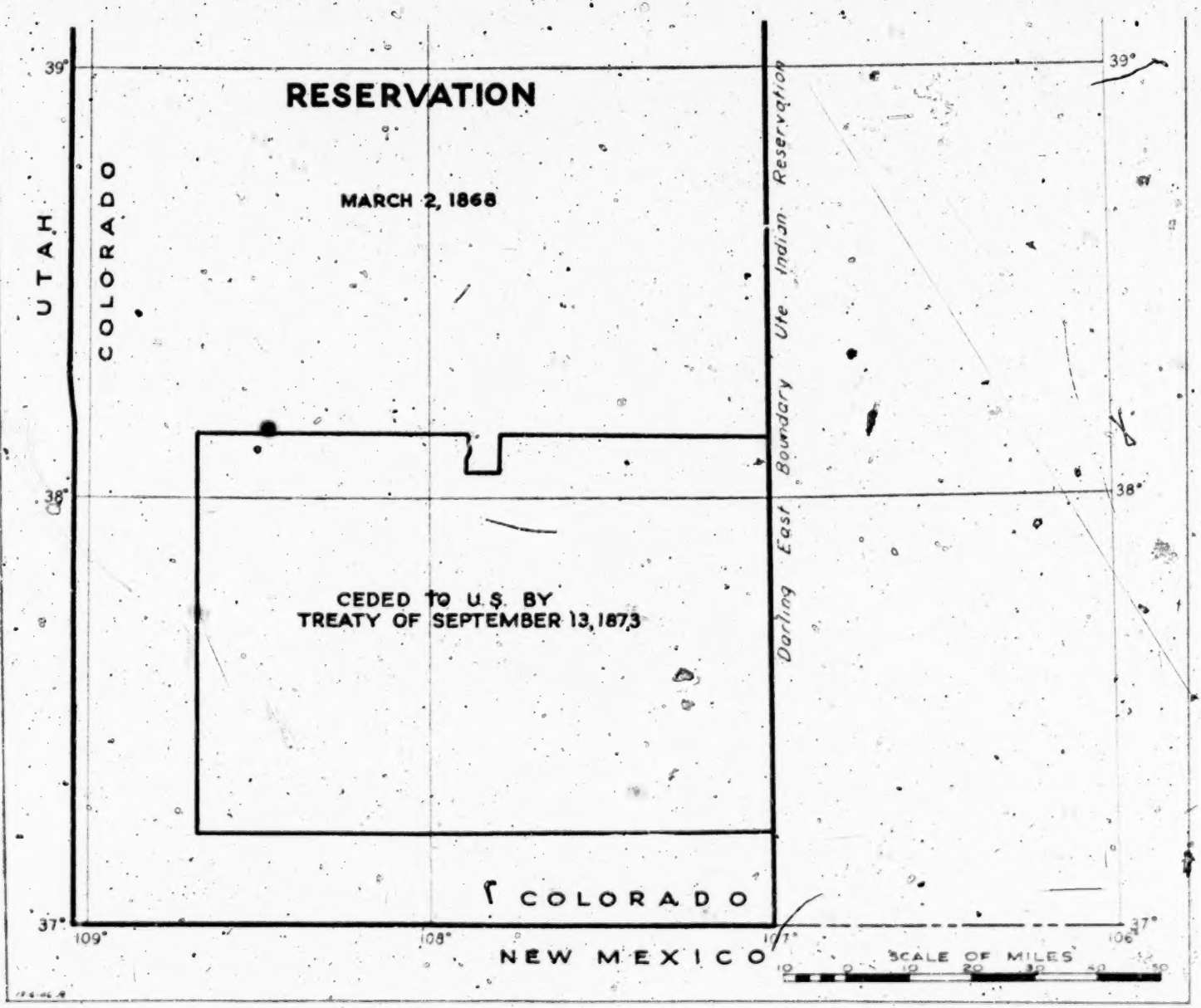
S. S. BURDETT

Commissioner

The NATIONAL ARCHIVES, Washington, D. C.
RECORDS OF THE GENERAL LAND OFFICE.
Record Copies of Letters Sent to
Surveyors General, Colorado.

U. S. GOVERNMENT PRINTING OFFICE: 1948


WYOMING
COLORADO
109°
108°
107°
106°
41°
40°
39°
NORTH
PARK
Route of Yampa
Yampa River
E O NOVEMBER 22, 1875
True North Line of 1868 Treaty Reservation
White
River
WHITE RIVER
AGENCY
Erroneous Miller Survey
Darling mile corner 222
UTE INDIAN
RESERVATION
MARCH 2, 1868
UTAH
COLORADO
Ute Indian Reservation


RESERVATION
MARCH 2, 1868
CEDED TO U.S. BY
TREATY OF SEPTEMBER 13, 1873
UTAH
COLORADO
NEW MEXICO
COLORADO
Darling East Boundary Ute Indian Reservation
39°
38°
37°
109°
108°
107°
106°
SCALE OF MILES
10 0 10 20 30 40 50

pp. 4, 6, 7,

SUPREME COURT OF THE UNITED STATES

No. 141.—October Term, 1946.

The Confederated Bands of Ute Indians, Petitioners, v. The United States.	On Writ of Certiorari to the Court of Claims of the United States.

[February 17, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Petitioners brought this action in the Court of Claims under the Act of June 28, 1938, 52 Stat. 1209, as amended, 55 Stat. 593, to recover compensation for lands made available to them by an 1875 Executive Order of the President and subsequently taken from them by the United States. Their claim was that by an Act of 1880, Congress had undertaken to sell these lands for the benefit of the petitioners, but that they had never been compensated for them. The Court of Claims, one judge concurring specially, made findings of fact and concluded as a matter of law that petitioners had no compensable interest in the lands because they "never did acquire title to these . . . lands and . . . the Congress never did agree to sell them for the account of" petitioners. — Ct. Cls. —. We granted certiorari, — U. S. —.

The findings of the Court of Claims from official letters, Executive Orders and statutes incorporated in these findings were as follows:

A treaty of 1868, 15 Stat. 619, between the United States and petitioners' ancestors, the Ute Indian tribes, established a reservation for them in Colorado. The northern boundary of the 15 million acres there ceded was described in the treaty as a line fifteen miles north of, and parallel to, the 40th parallel of north latitude. In the 15-mile wide strip north of the 40th parallel lay the White River Valley which had been settled by the Utes as a most suit-

able place for grazing and cultivation. One of the two Government Indian agencies provided for the reservation by the treaty was established in that strip.

As a result of misunderstandings in 1869 and 1874 between the Utes and white settlers to the north as to the true location of the northern treaty boundary, a survey was made in 1875 by one Miller. Miller's instructions, however, required him to stake out a line which he admitted to the local Indian agent and to the Utes themselves to be fifteen to eighteen miles south of the true boundary described in the treaty. If Miller's line had been correct, it would have excluded from the 1868 reservation the fertile White River Valley, and would have also excluded the agency buildings which had been erected there.

The marking out of the erroneous Miller line greatly upset the Indians because they feared they would be driven from the White River Valley. This embarrassed the local Indian agent who had previously assured the Indians that the White River Valley lay within their reservation. He promptly reported the results of the survey and the reaction of the Indians to the Commissioner of Indian Affairs in Washington, and urged the necessity of a new survey at the earliest practicable date. He stated that if the Miller survey were correct, however, the Indians would be driven from the White River Valley—"the only farming land and stock range in this part of the reservation"—and forced to settle on a river forty miles to the south. The Commissioner, acting on this report and a statement by Miller's attorney that Miller's line was correct, wrote to the Secretary of the Interior that the Miller survey "develops the fact that the White River and surrounding valleys as well as the Agency buildings and improvements at the White River Agency lie north of the . . . boundary and consequently are not within the limits of the . . . Ute Reservation." He therefore recom-

mended to the Secretary that the President be requested to issue an Executive Order to make available to the Utes additional territory north of the 1868 treaty boundary. The President, on the recommendation of the Secretary of the Interior, issued the order.[1] And thereafter the Commissioner wrote the local agent that the order included "all that tract of country lying between the north boundary of the Ute reservation as defined in the treaty of March 2, 1868 . . . which was the boundary surveyed by Mr. Miller. . . . This action fully protects your Indians in the peaceable possession of their improvements in the White River Valley and the Agency buildings, and will enable you to assure the Indians of the exact location of their reservation as enlarged."

In 1879, several years after the Executive Order was issued, hostilities broke out between some of the Utes and Government representatives in which the Indian agent at White River, all the agency's male employees, and a U. S. military detachment were killed in the so-called "Meeker massacre." Ex. Doc. No. 1, pt. 5, 47th Cong., 2d Sess. (1879) 16–19, 82–97. There have been charges and counter-charges as to who was responsible for inciting these hostilities. Whoever was responsible, it is clear that Congress, aroused by the massacre, took steps to punish the

---

[1] The Executive Order of November 22, 1875, 1 Kappler, Indian Affairs, Laws and Treaties, 834 (1904) is as follows:

"It is hereby ordered that the tract of country in the Territory of Colorado lying within the following-described boundaries, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (State. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to the present reservation in said Territory."

Indians who participated in it, to dispossess the Utes of their reservation, and to remove them from Colorado. Congressional action to accomplish this was provided by the Act of June 15, 1880, 21 Stat. 199, which ratified and embodied an agreement reached earlier that year between the Government and the leaders of the Utes who had promised "to use their best endeavors with their people to procure their consent to cede to the United States all the territory of the present Ute Reservation. . . ." This Act authorized specific allotments to individual Indians from the lands so ceded. But § 3 provided that "all the lands not . . . allotted, the title to which is, by the said agreement of . . . the Ute Indians, and this acceptance by the United States, released and conveyed to the United States . . ." would be restored to the public domain for sale as public lands. The proceeds of the sale of the land so conveyed by the Utes to the United States were, upon satisfaction of indemnity conditions imposed because of the massacre, to be distributed to the Indians. Thereafter, in 1882, an Executive Order declared that the lands withdrawn from the public domain by the Executive Order of 1875 and "set apart for the use of the . . . Ute Indians . . . hereby is restored to the public domain." 1 Kappler, *supra*, 834–835.

§ Pursuant to an act of 1909, 35 Stat. 781, petitioners recovered a judgment for the proceeds of certain lands sold by the Government, as well as the value of certain lands appropriated by the Government to its own use, all of which were part of the 1868 treaty lands. The Ute Indians *v.* United States, 45 Ct. Cls. 440, 46 Ct. Cls. 225. Thus, except for certain treaty lands not at issue here, litigation concerning which is now pending in the Court of Claims, the only lands in Colorado for which the Indians have not been paid are those to the north of and outside the 1868 treaty reservation which were made available to them by the Executive Order of 1875. ~~1868 treaty reservation which were made available to them by the Executive Order of 1875.~~

In pursuit of compensation for these Executive Order

lands, petitioners have brought this action pursuant to the Act of June 28, 1938, *supra*. That Act confers jurisdiction on the Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of the Utes and to award judgment for the Indians where it is found "that any lands formerly belonging" to them "have been taken by the United States without compensation. . . ."

Petitioners contend here that their predecessors understood that they not only owned the White River Valley lands, but that they also owned the Executive Order lands when, in 1880, they agreed to cede their reservation; and that Congress, by incorporating the agreement in the 1880 Act, thereby ratified it along with the Indians' understanding of it. Petitioners further contend that whether or not Congress intended to obligate the Government to account for the Executive Order lands, they knew of the Indians' understanding so that "the understanding of the Indians having been established," their understanding entitles them to recover. Finally they argue that the Executive Order, unlike the one in issue in *Sioux Tribe of Indians v. United States*, 316 U. S. 317, conveyed a compensable interest to these Indians. The Government counters that the President had no power to give a compensable interest to the Indians to lands lying outside the true 1868 treaty boundaries; that if the President intended to make available lands outside the true boundary it was only to give a transitory, possessory, and not a compensable, interest; that his intent was, in fact, only to secure the Indians in their possession of the White River Valley, but no more, on the mistaken assumption that the White River Valley had been cut off from the reservation by the Miller survey; that the 1880 Act, neither by its terms, its legislative history, nor its administrative interpretation, suggests that Congress intended to ratify or expand the Executive Order or to compensate the Indians for the Executive Order lands; that the Indians did not have a

contrary understanding; that in the face of such clear legislative language and intent, a contrary understanding of the Indians, even if established, could not justify a holding that the Indians obtained a compensable interest.

~~It is conceded that the petitioners have already been fully compensated for the White River valley lands and, in fact, for every acre of the land which was contained in the true boundaries of the 1868 reservation.~~ The additional claim, insofar as it rests on the Executive Order of 1875, cannot be sustained. For the President had no authority to convey to the petitioners a compensable interest in the lands described in the order lying north of the true 1868 boundary. *Sioux Tribe of Indians* v. *United States, supra.*[2] Nor is there any indication in the findings that the President intended to convey more than a transitory, possessory interest by the 1875 Order. That order made the Indians no more than tenants at the will of the Government on that part of the land outside the true treaty reservation. *Id.* at 331. Moreover, the Court of Claims' findings of fact, as emphasized by the special concurring opinion, indicate that the Executive Order was promulgated under the mistaken belief that its issuance was necessary in order to give the Indians the use of the White River Valley lands intended to be granted to them by the 1868 treaty and from which they might otherwise have been excluded by the Miller survey. These findings do not indicate that the Commissioner, the Secretary, or the President intended the order to make available the lands it in fact described lying north of the true treaty boundary. The order was designed only to resolve the misunderstanding created by Miller about the White River Valley lands.[3]

[2] *Cf.* Executive Order of August 17, 1876, which interpreted a treaty so as to "set apart (certain land) as a part of the Ute Reservation, in accordance with the first article of an agreement made with said Indians and ratified by Congress. . . ." 1 Kappler, *supra*, 834.

[3] The Court of Claims did not find this as an ultimate fact. But the correspondence which plainly shows it was incorporated in the find-

~~It is conceded that the petitioners have~~ either been, or are currently pressing litigation in the Court of Claims by which they seek to be compensated for the White River Valley lands, and in fact for all of the land which

The fullest possible purpose of the Executive Order has actually been carried out. For the Indians' enjoyment of the White River lands was protected during their stay on the reservation, and the Government has paid the Indians for them. It is with these things in mind that we must consider petitioner's contention that they have a right to recover compensation because of the 1880 Act.

There is not one word in that Act showing a congressional purpose to convey the Executive Order lands, or any other lands, to the Indians. On the contrary, the Act embodied a transaction whereby the Indians were the transferors and conveyed lands to the Government. For the value of lands so conveyed, and for no other, the Government was to make an account to the Indians after certain deductions had been made.

Nor is it possible to deduce from the 1880 Act a congressional purpose to transform the Executive Order into a conveyance of something more than a mere temporary and cancellable possessory right to the Indians. Neither the language of the 1880 Act, its legislative history, nor the circumstances which brought it about, justify the claim that Congress intended to expand the Executive Order into a transfer of a compensable interest in lands not included in the original treaty reservation. The Act was an aftermath of the "Meeker massacre." With the massacre in mind, Congress decided to remove the Indians from the Colorado reservation as part of the punishment meted out for this tragedy.[4] The very first section of the

---

ings. This Court has said with reference to findings of the Court of Claims that the "absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference." *United States* v. *Wells*, 283 U. S. 102, 120.

[4] See S. 772 and S. Res. 51, 10 Cong. Rec. pt. 1 (1879) 30, 77; H. Res. 142, 10 Cong. Rec. 44; H. R. 2420, 10 Cong. Rec. 17; H. Res. 154, 10 Cong. Rec. 113; H. R. 5092, 10 Cong. Rec. pt. 2 (1880) 1538.

For the Indians' enjoyment of the White River lands was protected during their stay on the reservation, and the lands have either already been paid for, or are the subject of pending litigation in the Court of Claims whereby the Indians

1880 Act prohibited any payments at all to the Indians until the Indians involved had surrendered, been apprehended, or until the President had proof that they were dead or outside the United States. Compensation for the families of the massacre victims was to be deducted from the land sale proceeds payable to the Indians. We cannot find from this background a congressional purpose to make a gift to the Indians of the Executive Order lands for which compensation is here sought. The only lands for which Congress agreed in 1880 to compensate the Indians were those that "the title to which" the Indians then "released and conveyed to the United States." They could only release and convey the lands that belonged to them, and only the lands given to them by the original 1868 treaty belonged to them. It was for compensation for such lands only that Congress, in 1938, authorized this action to be maintained. Under all these circumstances, the fact that the 1880 Act required the chiefs and headmen to procure the consent of their people to the cession of "the present Ute Reservation," is not sufficient to attribute to Congress a purpose to treat as a part of that reservation, lands which had never been legally conveyed to the Indians and which had only been made available to them by the Executive Order for the sole purpose of making them secure in their possession of the White River Valley.

It is said, however, that the Indians understood in 1880 that they owned the Executive Order lands which lay north of the White River Valley; that they understood their "present Ute reservation" to include them; that they understood that Congress undertook by the 1880 Act to sell the lands for their benefit; and that Congress was aware of this understanding. The majority opinion of the Court of Claims stated that "in all probability" this was true. The writer of the concurring opinion thought differently. But even if the Indians had believed that they had a compensable interest in the Executive Order lands,

this fact would not necessarily have given it to them. Certainly the absence of presidential authority to give them a compensable title could not be supplied by the Indians' understanding that the President had such authority. The Sioux Indians may also have thought the President had authority to convey title to them; but the reasons on which our decision in the *Sioux* case, *supra*, rested do not indicate that our holding depended in any way upon the understanding of the Indians. Nor can this alleged understanding be imputed to Congress in the face of plain language and a rather full legislative history indicating that the 1880 Act neither conveyed nor ratified conveyance of these lands. While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create Presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation* v. *United States*, 318 U. S. 423, 431–432. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so. Solicitous as the Government is to carry out its promises to the Indians in good faith, we are satisfied from this record that the Government has performed all that it promised.

As we have pointed out, it seems obvious to us from the findings of the Court of Claims that the Executive Order was only intended to secure for these Indians' ancestors possession of the White River Valley lands conveyed to them by the original 1868 treaty, and which was jeopardized by the Miller survey.[8] In fact, the President had no authority to convey a compensable interest in these or other lands to the Utes. Fairly to carry out the 1868

[8] See p. 6, *supra*.

treaty was the order's aim. The 1880 Act, we believe, did not enlarge upon the limited purpose of the Executive Order. To compensate these Indians for lands not intended to be conveyed by the 1868 treaty the Executive Order, nor the 1880 Act, would be to pay them for lands which neither they nor their ancestors ever owned and to which they had no claim in equity or justice, so far as the transactions here at issue are concerned. No rule of construction justifies such a result.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 141.—October Term, 1946.

The Confederated Bands of Ute Indians, Petitioners, v. The United States. | On Writ of Certiorari to the Court of Claims of the United States.

[February 17, 1947.]

Mr. Justice Murphy, dissenting.

The United States, in my opinion, is morally and legally obligated to pay for the land in issue in this case. The Executive Order of 1875 by its terms set aside certain land up to the "first standard parallel north" for the use of the Ute Indians "as an addition to their present reservation." That order alone, of course, could convey no compensable interest to the Indians under the rule of *Sioux Tribe* v. *United States*, 316 U. S. 317. But events subsequent to the issuance of the Executive Order in this case make inapplicable the principle of the *Sioux* case. In 1880 the United States and the Ute chiefs and headmen entered into an agreement whereby the latter promised "to use their best endeavors with their people to procure their consent to cede to the United States all of the territory of the present Ute Reservation in Colorado." Congress thereupon passed the Act of June 15, 1880, which recited in its preamble that the chiefs and headmen had "submitted to the Secretary of the Interior an agreement for the sale to the United States of their present reservation in the State of Colorado." The Act then incorporated the agreement previously made and provided that all unallotted lands should be deemed to be released and conveyed to the United States.

It seems clear to me that by 1880 the term "present reservation" included the land which the Executive Order of 1875 stated had been set aside as an addition to the then

present reservation. And when the 1880 agreement and the 1880 Act referred to "present reservation" they must have included that additional land. Adding this informal acknowledgment by Congress of the expanded reservation to the occupation of the land by the Indians and their understanding that it belonged to the reservation, a compensable interest becomes evident. It is immaterial that there were no formal documents conveying a fee simple interest to the Indians; it is likewise irrelevant that there was no formal acknowledgment of the Indian title. *Spalding* v. *Chandler*, 160 U. S. 394; *United States* v. *Alcea Band of Tillamooks*, 329 U. S. —. It is enough that the Indians had the right to possess and occupy the land and that the Indians fairly understood that to be the case. An acknowledgment by Congress, however informal, then adds a legal obligation to the moral duty of the United States to pay for the land involved. Such is the situation here.

The Court indicates, however, that the Executive Order of 1875 does not mean what it says. It clearly set apart for the use of the Indians "as an addition to their present reservation" all the described land up to the "first standard parallel north." But it is now suggested that those responsible for the promulgation of that order did not really intend to set aside all the land up to the "first standard parallel north," despite the explicit language used. It is said, rather, that the order actually was designed to affect only the White River Valley lands—lands which are some nine miles south of the "first standard parallel north." That interpretation of the intent of the framers of the order would make the northern boundary of the Executive Order land coterminous with the northern boundary of the true treaty reservation.

But there is nothing in the findings of the Court of Claims to justify such an interpretation. To disregard the plain words of the order by subtracting a nine-mile

strip from a clearly worded description requires definite findings to that effect which are supported by the record. It is not our function, of course, to supply those findings ourselves. Nor can we infer them from the decision of the Court of Claims. That court alone has the power and the duty to make the necessary findings on material issues. 53 Stat. 752, 28 U. S. C. § 288; *United States* v. *Causby*, 328 U. S. 256, 267–268. If it is material that the framers of the Executive Order intended to set aside less land than that described in the order, the case should be remanded to the Court of Claims so that it can make the necessary findings in this respect.

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS join in this dissent.